CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

Analysis of Administrative Civil Liability

Complaint No. 2001-138

Southwest Marine

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by
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INTRODUCTION

This report provides a summary of factual and analytical evidence supporting administrative assessment of civil liability in the amount of twelve thousand six hundred sixty-four dollars ($12,664) against *Southwest Marine* (SWM) for violations of *Waste Discharge Requirements (WDR), Order No. 97-36, General NPDES Permit No. CAG039001*, as alleged in *Complaint No. 2001-138*.

BACKGROUND

The SWM facility is located on the eastern waterfront of central San Diego Bay, on approximately 10.39 acres of land and approximately 16.64 acres of water, at the foot of Sampson Street, in the City of San Diego. The San Diego Unified Port District is the lessor to SWM.

The SWM operates and maintains a *Storm Water Diversion System* (SWDS) to eliminate and reduce the concentrations of pollutants discharged to San Diego Bay. The SWDS is designed to capture the first 0.25-inch of storm water that has fallen on the property. Following the diversion of the first 0.25-inch of rainwater, the remaining runoff may be directed to San Diego Bay.

At the SWM shipyard ship repair activities and support for ship repair activities are conducted. The ship repair activities include abrasive blasting, hydroblasting, metal grinding, painting, tank cleaning, removal of bilge and ballast water, removal of anti-fouling paint, sheet metal repair work, electrical work, mechanical repair, engine repair, and sewage disposal. The waste generated from ship repair activities include abrasive grit, paint chips, paint spray, metal chips, solvents, oils, petroleum products, sewage, metal debris, and construction debris. Each of the wastes has the potential to be in the storm water runoff. Various best management practices, sweeping, house keeping, and storm water diversion measures have been implemented by SWM in an attempt to abate the pollution of storm water at the shipyard.

Because of the potential for various pollutants to be in the storm water discharge from the shipyard, the WDR included *a Discharge Specification* for toxicity. The monitoring for toxicity provides an indication of the quality of the storm water discharge. Because different ship repair activities occur at different locations at the shipyard each storm water discharge is sampled and analyzed.

The storm water sampling and analyses are conducted pursuant to *Order No. 97-36* and *Monitoring and Reporting Program No. 97-36*. The toxicity limit in *Order No. 97-36, Discharge Specification B.8.*, states the following:

> *Effective July 1, 1999, in a 96-hour static or continuous flow bioassay (toxicity) test, undiluted stormwater runoff associated with industrial activity which is discharged to San Diego Bay shall not produce less than 90 percent survival, 50 percent of the time, and not less than 70 percent survival 10 percent of the time, using a standard test species and protocol approved by the Executive Officer. Until July 1, 1999, this level of acute toxicity shall be a performance goal. [Enclosed Bays and Estuaries Policy]*

SWM submitted data for storm water discharges to San Diego Bay from *Pier 1* and *Pier 3* for a February 12, 2000, storm event. The survival rate for the samples were 35% for *Pier 1* and 80% for *Pier 3*. A violation of the WDR is assessed in *Complaint No. 2001-138* for the two reported storm water discharges to San Diego Bay because the survival rate was less than 90% in the undiluted storm water discharges for 50% of the time.

When applying *Discharge Specification B.8.* the *percent* requirements must be clarified. The *90% survival* requirement is achieved by the survival of 9 out of 10 test animals (or a similar ratio) in undiluted storm water for 96-hours. Each sampling analysis is evaluated as either achieving the 90% survival rate or not achieving the 90% survival rate. Failing to achieve 90% survival rate is evaluated according to the *50% of the time* requirement.

The *50% of the time* requirement is achieved by dividing the number of test that achieved the 90% survival rate by the total number of test analyses.

For *Order No. 97-36* the storm water *sampling reporting period* is July 1 to June 30. Any samples from an outfall discharge to San Diego Bay would be evaluated for the sampling reporting period.

An example of how to calculate compliance for two different monitoring situations is given in *Example 1. An Example for Calculating Compliance*.

Example 1. An Example for Calculating Compliance.

Given:

a) Sampling data for one sampling reporting period (e.g. July 1 to June 30) from the same discharge point where four different storm event discharges were sampled and analyzed.

Sample ID	Survival Rate
S-1, October	80%
S-1, November	95%
S-1, December	80%
S-1, January	100%

b) Sampling data for one sampling reporting period (e.g. July 1 to June 30) from a discharge point where only one storm event discharge was sampled and analyzed.

Sample ID	Survival Rate
S-2, February	80%

Find:

What is the compliance status for the monitoring situation in **a)** S-1 data and in **b)** S-2 data?

Solution:

a) There are four samples taken for the sampling reporting period where two samples results were greater than 90% survival and two sample results were less than 90% survival.

Total number of samples = n = 4

Total number of samples with 90% or greater survival rate = s = 2

The equation for compliance is:

s/n x 100% = % of time 90% or greater survival rate

Therefore:

2/4 x 100% = 50% of time 90% or greater survival rate

With 50% of the data having 90% or greater survival rate the discharge achieves compliance and there is no violation. (Recall that the discharge . . . *shall not produce less than 90 percent survival, 50 percent of the time . . .)*

b) There was one sample taken for the sampling reporting period where one sample result was less than 90% survival.

Total number of samples = n = 1

Total number of samples with 90% or greater survival rate = s = 0

The equation for compliance is:

s/n x 100% = % of time 90% or greater survival rate

Therefore:

0/1 x 100% = 0% of time 90% or greater survival rate

With 0% of the data having 90% or greater survival rate the discharge does not achieve compliance and there is a violation. (Recall that the discharge . . . *shall not produce less than 90 percent survival, 50 percent of the time . . .)*

In addition to monitoring for toxicity, *Monitoring and Reporting Program No. 97-36* includes monitoring for 16 chemical compounds. By including the monitoring for chemical compounds, the chemical concentrations in the storm water discharges can be identified and evaluated.

ALLEGATIONS

The following allegations against SWM are the basis for assessing administrative civil liability in *Complaint No. 2001-138.*

FAILURE TO COMPLY WITH DISCHARGE SPECIFICATION B.8. OF ORDER NO. 97-36

According to SWM's *1999-2000 Annual Stormwater Monitoring Report*, on February 12, 2000, SWM sampled storm water runoff from two discharge points that resulted in two outfall discharges from the facility to San Diego Bay. The analytical results from the samples collected at both discharge points revealed a toxic response that violated the storm water discharge specification in *Order No. 97-36*. A violation was assessed for each of the two outfall discharges to San Diego Bay. The severity of the toxic response varied at each discharge point; *Pier 1* had a 35% survival rate, and *Pier 3* had an 80% survival rate.

Two separate toxicity analyses were conducted on each sample and the survival responses were reported as the mean survival response for the two samples. A *lethality and growth* test was conducted using *Mysidopsis bahia*, an invertebrate (shrimp). The toxicity test was a 96-hour static test, that is, at the end of 96-hours the number of surviving shrimp are counted and reported. A laboratory control test is also conducted simultaneously. All of the control laboratory samples had a survival rate of 90% or greater.

The storm drain system and pier locations are identified in *Figure 1. SWM Facility Plot Plan* (SWM Technical Report, August 30, 1999) attached at the end of this document. The exact outfall discharge locations for *Pier 1* and *Pier 3* were not reported in the monitoring report and are not identified in *Figure 1*.

The compliance calculations for the storm water discharge data provided by SWM for *Pier 1* is shown in *Example 2. Calculating Compliance for Pier 1 Discharge to San Diego Bay*.

Example 2. Calculating Compliance for *Pier 1* Discharge to San Diego Bay.

Given:

Sample ID	Survival Rate
Pier 1	35%

Find:

What is the compliance status for *Pier 1* during wet weather season 1999-2000?

Solution:

There was one sample analyzed for toxicity for the 1999-2000 sampling period for the discharges from *Pier 1*.

Total number of samples = n = 1

Total number of samples with 90% or greater survival rate = s = 0

The equation for compliance with 90% survival 50% of the time is:

s/n x 100% = % of time 90% or greater survival rate

Therefore:

0/1 x 100% = 0% of time 90% or greater survival rate

At 0% of the time having greater than 90% survival rate the discharge does not comply with *Discharge Specification B.8.* (Recall that the discharge . . . *shall not produce less than 90 percent survival, 50 percent of the time . . .)*

The compliance calculations for the storm water discharge data provided by SWM for *Pier 3* is in *Example 3. Calculating Compliance for Pier 3 Discharge to San Diego Bay.*

Example 3. Calculating Compliance for *Pier 3* Discharge to San Diego Bay.

Given:

Sample ID	Survival Rate
Pier 3	80%

Find:
What is the compliance status for *Pier 3* during wet weather season 1999-2000?

Solution:
There was one sample analyzed for toxicity for the 1999-2000 sampling period for the discharges from *Pier 3*.

Total number of samples = n = 1

Total number of samples with 90% or greater survival rate = s = 0

The equation for compliance is:
s/n x 100% = % of time 90% or greater survival rate

Therefore:
0/1 x 100% = 0% of time 90% or greater survival rate

At 0% of the time having 90% or greater survival rate the discharge does not comply with *Discharge Specification B.8.* (Recall that the discharge . . . *shall not produce less than 90 percent survival, 50 percent of the time . . .)*

DETERMINATION OF ADMINISTRATIVE CIVIL LIABILITY
Pursuant to the Porter-Cologne Water Quality Control Act, California Water Code (CWC), § 13385 et seq., the maximum civil

liability that a regional board may assess for violations of waste discharge requirements is:

- ten thousand dollars ($10,000) per day of violation; and
- ten dollars ($10) for every gallon discharged, over one thousand gallons discharged, that was not cleaned up.

Factors to be Considered in Determining the Amount of Administrative Civil Liability

When a regional board is determining the amount of civil liability imposed pursuant to CWC § 13385 et seq., the following factors shall be taken into account:

- the nature, circumstances, extent, and gravity of the violation, and
- with respect to the violator, the ability to pay,
- any prior history of violations,
- the degree of culpability,
- economic benefit or savings, if any, resulting from the violation, and
- other matters that justice may require.
- At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.

Nature, circumstances, extent, and gravity of violation

Toxicity of the Discharge

The survival rates for the storm water discharge analyses during the wet weather season 1999-2000 indicate that the discharges are toxic and do not comply with *Discharge Specification B.8*. As noted from SWM's *Annual Stormwater Monitoring Report* submitted by SWM on August 30, 2000, the storm water discharges listed in *Table 1. Storm water toxicity, July 1, 1999 through June 30, 2000*, violated the specified survival rate limits for toxicity required by *Order No. 97-36, Discharge Specification B.8.* (Copies of the Monitoring Data sheets are attached at the end of this document.)

The *Pier 1* discharge point had a 35% survival response and the *Pier 3* discharge points had an 80% survival response.

Table 1. Stormwater toxicity, July 1, 1999 through June 30, 2000.

Sample date	ID Number	Acute toxicity, 96-hour percent survival
Feb 12, 2000	Pier 1	35
Feb 12, 2000	Pier 3	80

Chemical concentrations in the storm water discharge

Although *Order No. 97-36* does not contain *a Discharge Specification* (numerical limit) for chemical compounds in the storm water discharge, *Monitoring and Reporting Program No. 97-36* requires SWM to analyze the storm water discharges for various chemical compounds. The chemical compounds analyzed in the storm water discharges include the following:

Total Petroleum Hydrocarbons (TPH)	Total Suspended Solids (TSS)
pH	Arsenic
Cadmium	Chromium
Copper	Lead
Mercury	Nickel
Silver	Zinc
Chemical Oxygen Demand (COD)	Tributyltin (TBT)
Oil & Grease	Total Organic Carbon (TOC)

During the wet weather year 1999-2000, the storm water discharges from SWM property to San Diego Bay were sampled and analyzed from two separate storm events. For the first storm water discharge sampling on February 12, 2000, samples from *Pier 1* and *Pier 3* discharges were analyzed for toxicity and chemical compounds. For the second storm water discharge sampling on March 5, 2000, samples from *Pier 1* and *Pier 3* discharges were analyzed for only the chemical compounds.

Sixteen chemical compounds were analyzed in the storm water discharges. The concentrations of copper and zinc were found at levels that could cause a toxic response.

The USEPA has adopted a *general storm water permit* document for various industrial facilities under its jurisdiction. The USEPA document, the *Final Reissuance of National Pollutant Discharge Elimination System (NPDES) Storm Water, Multi-Sector General Permit for Industrial Activities, Federal Register, Monday, October 30, 2000,* (Multi-Sector Permit) can be used to evaluate

the significance of the chemical concentrations in SWM's storm water discharge to San Diego Bay.

The Multi-Sector Permit, *Sector R*, includes requirements for *Ship and Boat Building or Repair Yards*. According to the Multi-Sector Permit (p. 64766-69), when the industrial storm water discharge has concentrations greater than the *USEPA Benchmark Values* (p. 64767, Table 3), the industrial facility is required to increase monitoring frequencies. Additionally, the Multi-Sector permit states that the facility operators should review and modify their storm water pollution prevention plans (SWPPP) and best management practices (BMP) at their facility to try to improve the quality of the storm water discharge when discharge concentrations are greater than the *USEPA Benchmark Values*.

While the *USEPA Benchmark Values* are not an enforceable numeric limit, they are used to indicate concentrations of concern and to alert the regulated industrial facility to take actions to lower the concentrations in its discharge. When comparing the chemical concentrations identified in the SWM storm water discharges to the *USEPA Benchmark Values,* some of the copper and zinc concentrations were significant.

Copper

The copper concentrations from the respective samples of storm water discharges during the wet weather season 1999-2000 were compared to the *USEPA Benchmark Values*. As listed in *Table 4. A comparison of the storm water discharge copper concentration with USEPA Benchmark Values*, the average copper concentrations from the storm water events taken in 1999-2000 were greater than the *USEPA Benchmark Values.* The storm water copper concentrations ranged from 0.0020 mg/L to 0.5330 mg/L and the average for the respective storms were 0.3143 mg/L and 0.1200 mg/L. Of the four samples analyzed for copper concentrations, one sample was greater than eight times the *USEPA Benchmark Value*, and two samples were greater than twice the *USEPA Benchmark Value*.

COPPER

Table 4. *A comparison of storm water discharge copper concentration with USEPA Benchmark Values.*

ID Number	Copper concentration February 12, 2000 (mg/L)	Copper concentration March 5,2000 (mg/L)	Copper concentration USEPA Benchmark value (mg/L)	Copper concentration California Toxics Rule (mg/L)
Pier 1	0.5330	0.0020	0.0636	0.0048
Pier 3	0.0955	0.2380	0.0636	0.0048
average	0.3143	0.1200	--	

Zinc

The zinc concentrations from the respective samples of storm water discharges during the wet weather season 1999-2000 were compared to the *USEPA Benchmark Values*. As listed in *Table 5., A comparison of the storm water discharge zinc concentration with USEPA Benchmark Values*, the average zinc concentrations from both sets of storm water discharge samples taken in 1999-2000 were greater than the *USEPA Benchmark Value* for zinc. The storm water zinc concentrations ranged from 0.0160 mg/L to 0.5410 mg/L and the average for the respective storms were 0.3141 mg/L and 0.1745 mg/L. Of the four samples analyzed for zinc concentrations, three samples were greater than the *USEPA Benchmark Value*, and one sample was greater than five times the *USEPA Benchmark Values.*

ZINC

Table 5. *A comparison of storm water discharge zinc concentration with USEPA Benchmark Values.*

ID Number	Zinc concentration February 12, 2000 (mg/L)	Zinc concentration March 5, 2000 (mg/L)	Zinc concentration USEPA Benchmark Value (mg/L)	Zinc concentration California Toxics Rule (mg/L)
Pier 1	0.5410	0.0160	0.117	0.090
Pier 3	0.0871	0.3330	0.117	0.090
average	0.3141	0.1745	--	--

Another document used to evaluate significance of the copper and zinc concentrations was the California Toxics Rule, 40 CFR 131.38 (CTR). The CTR identifies the water quality criteria maximum concentration for saltwater for copper at 4.8 µg/L (.0048 mg/L) and for zinc at 90 µg/L (.090 mg/L). Three of the copper concentrations of the storm water discharges listed in *Table 4* exceed the CTR values. Three of the zinc concentrations of the storm water discharges listed in *Table 5* exceed the CTR values.

Volume

The volume of SWM's storm water discharges vary during a storm event according to the size of the storm event and according to the diversion practices being implemented. As listed in *Table 6. Reported storm flow volumes for SWM 1999-2000*, SWM reported a total flow of 15,276 gallons on February 12, 2000. None of the flow was cleaned up.

Table 6. *Reported storm flow volumes for SWM 1999-2000.*

ID Number	Reported Volume 2/12/2000 (gallons)	Reported Volume 5/5/2000 (gallons)
Pier 1	3,644	2,169
Pier 3	11,632	6,924
sum	15,276	9,093

With respect to the violator, the ability to pay

SWM has not submitted any evidence that payment of the proposed civil liability would impair its ability to continue in business.

Prior History of Violations

SWM has not previously been cited for violations of storm water toxicity. The *storm water toxicity specification* in *Order No. 97-36* did not take effect until July 1, 1999. The toxicity specification was a performance goal until July 1, 1999. Monitoring for toxicity in the storm water was conducted and reported for the previous wet weather year 1998-1999. Some of the results did show toxicity in the discharge. For the wet weather year 1998-1999, the *toxicity specification* was a *performance goal* and not a *discharge specification*; therefore, the toxicity responses in the storm water were not a violation of *Order No. 97-36*.

Degree of Culpability

Due to the considerable attention to protect San Diego Bay and the amount of time allowed by *Order No. 97-36* for SWM to comply with *Discharge Specification B.8.*, the storm water discharges during the wet weather year 1999-2000 should have been in compliance with *Order No. 97-36*. SWM could have taken additional best management practices, house keeping measures, or could have diverted the storm water to the sanitary sewer to prevent the discharge of storm water that failed to achieve a 90% or greater survival rate.

Order No. 97-36 provided SWM with approximately twenty months to comply with the *storm water discharge specification*. The *Order* was adopted on October 15, 1997. The sampling that occurred on February 12, 2000, was approximately twenty-eight months after

the adoption of *Order No. 97-36*. For the previous wet weather year, 1998-1999, seven of seven storm water discharge sampling and analyses, did have a toxic response that failed to achieve 90% survival rate.

Storm water monitoring data for toxicity is not available for wet weather year 1997-1998 because *Order No. 97-36*, although adopted, was in various stages of appeal, litigation, and stay. For the wet weather year 1997-1998 the storm water monitoring was conducted pursuant to the previous NPDES permit for SWM, *Order No. 83-11* which did not have a storm water toxicity monitoring requirement.

Pursuant to the *Standard Provisions* for an NPDES permit (40 CFR 122.41(d)), SWM has the duty to minimize or prevent any discharge in violation of the permit which has a reasonable likelihood of adversely affecting human health or the environment.

Economic benefit or savings, if any, resulting from the violation

SWM may have saved substantial capital, and operating and maintenance costs by failing to implement best management practices, housekeeping measures, or by failing to divert the storm water to the sanitary sewer to prevent the discharge of storm water that failed to achieve a 90% or greater survival rate.

Other matters as justice may require.

SWM has made substantial progress in storm water control and management, in fact, SWM has spent money attempting to control storm water discharges to San Diego Bay. A storm water diversion system has been installed by SWM to divert various catchment basins at its facility to the sanitary sewer. For the wet weather year 1999-2000, SWM had only two outfall discharge locations compared to seven outfall discharge locations for the previous wet weather season.

When considering the effort by SWM to control storm water discharges, the recommended liability for volume of discharge (per gallon minus the first 1000 gallons) is minimal. The recommended liability considers that SWM reported the total volume of the discharge and that certain samples had chemical concentrations for copper and zinc that were below or near the respective *USEPA Benchmark Values*.

Staff time
The Regional Board has expended an estimated eighty hours to investigate and consider enforcement actions over the course of dealing with SWM regarding the storm water toxicity identified in this analysis. At an average rate of eighty dollars ($80) per hour, the total investment of Regional Board resources is $6,400.

Susceptibility to Cleanup and Voluntary Cleanup Efforts Undertaken
The storm water discharges to San Diego Bay are not susceptible to cleanup. However, the marine sediments in San Diego Bay within the SWM leasehold are susceptible to cleanup. Marine sediment chemical concentrations are significant and the chemical concentrations in the storm water are significant.

Therefore, the calculations for the civil liability include a factor for the volume of discharge pursuant to CWC § 13385 et seq.

At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.
At this time staff is unable to quantify any specific economic benefit realized by SWM from failing to comply with *Order No. 97-36*.

CALCULATION OF CIVIL LIABILITY
Pursuant to the CWC, § 13385 et seq., the maximum civil liability that a Regional Board may assess for violations of waste discharge requirements is:

- ten thousand dollars ($10,000) per day of violation; and
- ten dollars ($10) for every gallon discharged, over one thousand gallons discharged, that was not cleaned up.

Potential Maximum Liability Calculation
The potential maximum violation for each violation is $10,000.

Pier 1
1 violation x $10,000 per day of violation = $10,000

Pier 3
1 violation x $10,000 per day of violation = $10,000

Sub Total = $20,000

The potential maximum violation for each gallon of discharge minus one thousand gallons is $10.00 per gallon.

Pier 1
(3,644 – 1,000)gallons x $10.00/gallon = $26,440

Pier 3
(11,632 – 1,000)gallons x $10.00/gallon = $106,320

Sub Total = $132,760

Potential Total Maximum Liability = $152,760

Recommended Liability Calculation
The maximum civil liability for each discharge is not being recommended because SWM had taken significant measures to control some of the storm water discharges.

The recommended civil liability for each outfall discharge location to San Diego Bay is $6,000 per violation.

Pier 1
1 outfall to San Diego Bay x $6,000/outfall = $6,000

Pier 3
1 outfall to San Diego Bay x $6,000/outfall = $6,000

Sub Total = $12,000

The maximum civil liability for each gallon of discharge is not being recommended because SWM had taken measures to control some of the storm water discharges, the total volume of storm water discharge was reported, the survival rate for the discharges were not severe, and the zinc and copper concentrations for some of the sampled discharges were below the *USEPA Benchmark Values*. Based on the factors in the assessment, the volume of the storm water discharges, the potential to impact the waters of San Diego Bay, and the potential impacts to the marine sediments in San Diego Bay, the recommended civil liability per gallon of discharge is $0.05 per gallon for the volume subject to assessment. The calculations for the volume of the storm water discharges are as follows:

Pier 1
(3,644 - 1000)gallons x $0.05/gallon = $132

Pier 3
(11,632 - 1000)gallons x $0.05/gallon = $532

Sub Total = $664

Total recommended penalty is the addition of the sub totals for each violation ($12,000) and for the volume of discharge ($664).

Total recommended penalty is:

$12,000 + $664 = $12,664

Minimum and Maximum Civil Liability Amounts Comparison of Proposed Civil Liability to SWRCB Guidance to Implement the Water Quality Enforcement Policy, Assessment Matrix

The *SWRCB Guidance to Implement the Water Quality Enforcement Policy* contains an *Assessment Matrix* as shown below. The matrix ranks the *Compliance Significance* (Discharger) and *Environmental Significance* (Discharge) as *Minor*, *Moderate* or *Major*. Based upon the determination of the two categories, a range of civil liability is provided. This matrix assists the Regional Board in determining, after a consideration of the factors considered for the ACL, whether the proposed ACL is appropriate.

Considering the time allowed by *Order No. 97-36* for SWM to comply with the toxicity specification for storm water discharge a *Moderate* rating for *Compliance Significance* is appropriate. Considering the toxic response of the storm water discharges, the chemical concentration in the storm water discharges, and the potential impacts to San Diego Bay or the sediments therein, a *Moderate* rating for *Environmental Significance* is appropriate.

Assessment Matrix

Compliance Significance (Discharger)	Environmental Significance (Discharge)		
	Minor	Moderate	Major
Minor	$100 - $2,000	$1,000 - $20,000	$10,000 - $100,000
Moderate	$1,000 - $20,000	$10,000 - $100,000	$50,000 - $200,000
Major	$10,000 - $100,000	$50,000 - $200,000	$100,000 to maximum amount

A review of the *Assessment Matrix* indicates that the recommended civil liability falls within the *Moderate* range for *Environmental Significance* and within the *Moderate* range for *Compliance Significance*.

Based on an analysis of all the factors, the recommended civil liability is appropriate.

TOTAL PROPOSED ADMINISTRATIVE CIVIL LIABILITY

The total proposed civil liability in this matter is **$12,664.**